



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04918/2018

**THE IMMIGRATION ACTS**

Heard at Royal Courts of Justice  
On Monday 3 September 2018

Determination Promulgated  
On Monday 10 September 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

[M M]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms J Bond, Counsel instructed by Irving & Co solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Oxlade promulgated on 29 June 2018 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 9 March 2018 refusing his protection and human rights claims. The Decision was made in the context of an automatic deportation order made in consequence of the Appellant’s conviction for

possession of Class A drugs with intent to supply. The Appellant was sentenced to a term of three years in a Young Offenders Institution on 20 December 2016 following a guilty plea.

2. The Respondent certified the Appellant's protection claim under Section 72 Nationality, Immigration and Asylum Act 2002. He also refused the Appellant's human rights claim based on his family and private life. The Appellant claims to be in a genuine and subsisting relationship with a Portuguese national exercising Treaty rights in the UK, Ms [L]. He says that his deportation to Bangladesh would be a breach of his Article 8 rights as Ms [L] could not be expected to accompany him back to his home country. The Appellant also relies on his residence in the UK since 2008.
3. The Judge rejected the Appellant's protection claim as not credible for reasons given at [74] to [75] of the Decision. I cannot see any finding by the Judge upholding or rejecting the Section 72 certification but since the protection claim was rejected in its substance and there is no challenge in relation to that finding, I need say no more about it.
4. The focus of the grounds of appeal is the Article 8 findings and, more specifically, the impact of EU law on those findings. I will come to the detail of the grounds below but for the moment it is sufficient to record that the Judge did not accept that the Appellant meets the requirements of the Immigration Rules ("the Rules"). In particular, she did not accept that the Appellant meets paragraph 399A of the Rules. The Judge considered whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules to outweigh the public interest but rejected the Appellant's case in that regard. For those reasons, the Judge dismissed the appeal on human rights grounds.
5. Permission to appeal the Decision was refused by First-tier Tribunal on 6 July 2018. The grounds of appeal to this Tribunal are shortly stated. I can therefore set the relevant parts out in full. Those read as follows:

"... [2] The Appellant seeks permission to appeal on the ground that the FTTJ erred in law when deciding this matter. This application is brought on the grounds that the FTTJ, in reaching her finding at paragraph para.55 that there is no evidence of integration in the United Kingdom of the Appellant. The Appellant has completed part of his primary and all of his secondary schooling in the UK and has provided evidence to this effect. The Appellant last resided in Bangladesh, visits on holidays, more than a decade ago. It is submitted that the situation regarding his remaining family members in Bangladesh has drastically changed and that there would be no support network for the very young adult Appellant which could help him to establish himself in Bangladesh.

[3] The FTTJ accepted that there is evidence that shows that the Appellant and Ms [L] are in a relationship. However, she concluded that Ms [L] "she has that sway over him" therefore would not be considered a protective factor. Both the Appellant and Ms [L]'s relationship started from a young age and has

been consist over the years with her fully supporting him in all proceedings. The FTTJ failed to consider that the Appellant would qualify for a residence card as an unmarried partner of an EEA national who is exercising treaty rights in the UK.”

6. Permission to appeal was granted by UTJ McWilliam on 26 July 2018 in the following terms:

“... It is arguable that the appellant’s partner is an EEA national exercising treaty rights. The judge accepted that the relationship was genuine and subsisting and it is arguable that the appeal should have been determined under the EEA regulations.

In so far as the immigration rules and article 8 are concerned the grounds do not identify an arguable error of law. It was conceded that the appellant's partner is not settled here as she does not have permanent residence.

The judge made lawful and sustainable findings in respect of 399A which are grounded in the evidence and adequately reasoned. The judge properly considered very compelling circumstances having considered all material matters.

The grounds challenge para. 55. This is not a finding of the judge but a record of the respondent’s submissions. The judge found that the appellant was integrated (see [73]).”

As will be readily apparent from the foregoing, the only point on which permission was granted is limited to the final sentence of the grounds and relates to the Appellant’s rights under EU law.

7. The matter comes before me to decide whether the Decision contains a material error of law and if so to re-make the decision or remit the appeal to the First-tier Tribunal.

### **Decision and Reasons**

8. Ms Bond accepted that she could not argue the point on which permission was granted at least in the way in which that is formulated. She accepted that there has never been an application for a residence permit as the extended family member (durable partner) of an EEA national exercising Treaty rights. The couple are not married under UK law. He is not therefore a family member. She accepted that, since there has never been an application relying on the Appellant’s EU law rights, there is no EEA decision such as to generate a right of appeal under the European Economic Area Regulations 2016 (“the EEA Regulations”). The right of appeal under Section 82 Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) is confined to the decision to refuse the Appellant’s protection and human rights claims. There is no ground available to the Appellant that the Respondent’s decision breaches his EU law rights. Such would only be available if there were a decision made under the EEA Regulations. Furthermore, a claim that the Respondent’s decision breaches his EU law rights would most likely amount to a new matter under Part 5 of the 2002 Act.

9. However, Ms Bond reformulated the argument. She said that, because Ms [L] is an EEA national entitled to a permanent right of residence under EU law, she should be treated as “settled” for the purposes of paragraph 399(b) of the Rules. The Judge has accepted that the Appellant is in a genuine and subsisting relationship with Ms [L] ([86] of the Decision) and that Ms [L] would not return to Bangladesh with the Appellant ([87]). Ms Bond says therefore that the Appellant could and should have succeeded under paragraph 399(b). At the very least there is an error of law in this regard and the issue whether deportation would have unduly harsh consequences for Ms [L] is something which would then require consideration.
10. Strictly, this is not a ground of appeal on which the Appellant has permission. I have nonetheless considered the submissions made. Mr Bramble did not object to Ms Bond arguing the case in this way.
11. There are a number of difficulties standing in the way of Ms Bond’s submission as she readily conceded. The first is that those representing the Appellant in the First-tier Tribunal did not argue that the Appellant could succeed under paragraph 399(b) of the Rules. As is recorded at [68] of the Decision, “[i]t was not argued that rule 399 applied: the Appellant has no children, and his relationship was with Ms [L] – a Portuguese national exercising treaty rights in the UK – and so not a “partner who is a British Citizen or settled in the UK””. Ms Bond expressly withdrew that concession on the part of the Appellant. However, that this was properly understood as a concession made by the previous representative is clear from the terms of the grant of permission by UTJ McWilliam.
12. The issue, as Ms Bond identified, is therefore whether the Judge should have been alerted to the possibility that Ms [L] was entitled to be treated as a “settled” person for these purposes based on the evidence as to her residence in the UK. Ms Bond accepted that Ms [L] did not (and, so far as I can see from the further evidence which the Appellant sought to adduce, still does not) have a permanent residence card. I accept though Ms Bond’s submission that this is not determinative since the granting of a permanent residence card is merely declaratory as to the EU law right which exists if the criteria are satisfied. I also need to take into account the guidance relevant to the question whether an EEA national with permanent residence is to be treated as “settled” for these purposes. Neither representative was able to take me to the Respondent’s guidance on that issue. I do not blame Mr Bramble for this. He, as I, had understood the case to be argued differently (as indeed did UTJ McWilliam) and had come prepared to argue only the short point identified by Judge McWilliam.
13. I turn therefore to the evidence which was before the Judge. I do not take into account the material submitted by the Appellant’s new solicitors filed under cover of letter dated 27 August 2018. There has been no proper application to adduce that evidence under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. As such, there is no explanation why that evidence was not adduced before

the First-tier Tribunal. In any event, the Decision cannot be impugned based on evidence which was not before the Judge and is not relevant to the issue whether there is an error of law in the Decision.

14. I begin with Ms [L]'s own statement which says this:

"... [2] I am a Portuguese national. I was born in Portugal, but have been residing in the UK for a number of years and am consequently well settled here.

[3] I have completed my secondary and college education in the UK and I am currently employed as an apprentice. I am looking to making an application for permanent residence in the UK shortly."

15. I accept that what is said at [3] might be interpreted as suggesting that Ms [L], who was born in 2000, had been in the UK since at the latest 2011 if she had undertaken all her secondary education here. However, she says that she "completed" that education here which does not necessarily mean that she was here throughout that period of her education. I will come to what the other evidence shows below.

16. The Appellant was represented in the First-tier Tribunal by experienced immigration counsel. Ms [L] gave oral evidence. There was the opportunity to develop her evidence on this point if, as Ms Bond asserts is the position, Ms [L] was already entitled as a matter of EU law to permanent residence. That did not happen and, as I have already noted, Appellant's Counsel went so far as to concede that the Appellant could not succeed under paragraph 399.

17. I turn then to consider the way in which the Respondent's decision deals with this issue as that might have alerted the Judge to it even if it was not argued for the Appellant (if the evidence otherwise supported the assertion that Ms [L] was entitled to permanent residence at the time). Under the heading of "Family life with a partner" (page [11] of the decision) the Respondent says this about the claim based on the relationship:

"You claim to have a family life in the UK with your partner, [Ms [L]]. The requirements of the exception to deportation on the basis of family life with a partner are set out at paragraph 399(b) of the Immigration Rules. This exception applies where:

- (b) *the foreign criminal has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and*
  - (i) *the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and*
  - (ii) *it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and*
  - (iii) *it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.*

It is not accepted that [Ms [L]] is a British citizen or settled in the UK because although you had sent a copy of her Portuguese ID card, there is no evidence of her residence in the UK, or to show that she has permanent residence here. Furthermore a check

on our own records, does not show any applications for such status, therefore it is not accepted she is settled in the UK.

It is not accepted that your claimed partner is in the UK because you have failed to provide any evidence of her residence in the UK.

It is not accepted that you have a genuine and subsisting relationship with [Ms [L]] because you have failed to provide any documentary evidence to show that you have been residing at the same address, in a relationship akin to marriage for at least 2 years prior to your conviction. Your legal representatives have stated in their letter dated 8 February 2017;

*“The client is a young adult who has not yet formed a family life of his own but is in a meaningful relationship with [Ms [L]]”*

This statement does not confirm that you and your claimed partner are in a genuine and subsisting relationship, particularly in light of the lack of documentary evidence to corroborate such a claim. Furthermore, there are no letters of support from your claimed partner.

Whilst it is not accepted that you are in a genuine and subsisting relationship with [Ms [L]], it is noted that you may have been entitled to embark upon such a relationship in the UK, as you have had ILR in the UK since 8 April 2011 and therefore are likely to have have been in the UK legally at the commencement of the claimed relationship.

It is not accepted that it would be unduly harsh for [Ms [L]] to live in Bangladesh if she chose to do so. Whilst it is not accepted that you are in a genuine and subsisting relationship with your claimed partner, it is submitted that even if you were it is considered that she would be able to adjust to life in Bangladesh with your support and assistance. In the event that she is currently residing in the UK, then it is considered that she has demonstrated an ability to adapt to life here, and if your claimed relationship is more than just a friendship, you have not presented any reasons why she would not be able to adjust to life in Bangladesh to continue a relationship with you.

It is not accepted that it would be unduly harsh for [Ms [L]] to remain in the UK even though you are to be deported. The copy of her Portuguese ID card suggests that she is a Portuguese citizen, and therefore would be permitted to remain in the UK in the event that you are deported provided she is able to show that she is exercising her Treaty rights here or acquires permanent residence in the UK. There is no evidence that your claimed partner is dependent upon you either financially or for her health and wellbeing.

Therefore, having considered all available information, it is not accepted that you meet the requirements of the exception to deportation of the family life with a partner.”

18. There are two bases on which it is said Ms [L] can show that she is entitled to permanent residence. The first is as a student and then worker in her own right. She was born in 2000 and therefore has remained in education until quite recently. However, the documents relating to her academic achievements which are in the bundle relate to qualifications attained in 2017 and a letter from her college dated July 2017 referring to the end of her current course without stating when it started. The documents show that she started working in January 2018.

19. The high point of her case as to her own residence in the UK is a letter dated 13 June 2018 from a GP stating that Ms [L] has been registered with the surgery since April 2013. There are though no medical notes or information about when she has seen a GP which can confirm continuity of residence between 2013 and the present.
20. At best, therefore, those documents are capable of showing that Ms [L] was in the UK in April 2013, that she commenced a college course in either 2015 or 2016 (depending on the length of the courses leading to the qualifications of which there is evidence) and that she has worked since January 2018. Her statement refers only to having been in the UK “for a number of years” (without specifying) and of an intention to apply for permanent residence “shortly” implying that she might not yet be entitled to apply.
21. The second basis of Ms [L]’s entitlement is as the daughter of her mother, also a Portuguese national (Ms [R]), who it is said has been exercising Treaty rights in the UK since September 2009 when she entered the UK with her daughter. She has provided some details of her employment since then in a letter. There is no witness statement from her. It does not appear from the Decision that she gave oral evidence. In any event, there is very limited evidence in support of her exercise of Treaty rights beyond what is said in the letter.
22. There is an employment document with Nandos dating back to 2013 confirming a start date of March 2013 (which is consistent with what is said in Ms [R]’s letter about when she started work there) but there is no evidence after that of her working for that company until 2018. There are some inconsistencies in her case. For example, she says in her letter that she has been resident since 2009 and living at an address in Gillingham but the tenancy agreement in the bundle relating to that address is for 2016/17.
23. Particularly in light of the concession that the Appellant could not meet paragraph 399(b) of the Rules, I am not satisfied that the evidence should have put the Judge on notice of the need to consider whether Ms [L] was entitled to permanent residence and therefore whether she could qualify as a “settled person” for the purposes of paragraph 399(b).
24. Even if I had accepted Ms Bond’s submission on this point, that would not be the end of the matter. There are two further difficulties standing in the way of the Appellant’s case as it now stands.
25. The first relates to the Respondent’s guidance as to who is to be treated as “settled” for the purposes of the Rules. The second relates to the remaining requirements of paragraph 399(b).
26. I have had regard to the Respondent’s guidance in relation to the eligibility criteria as a partner for the purposes of family and private life applications entitled “Family

Migration: Appendix FM Section 1.0B: Family Life (as a Partner or Parent) 10 Year Routes” (Version 1.0 published 22 February 2018). At [29/106] the point is made that, in order to qualify as a “settled” person for the purposes of sponsoring an application as a partner, the EEA national must hold a residence permit certifying their permanent residence under the relevant EEA Regulations. It is not suggested that Ms [L] had or indeed has such a document.

27. I reject Ms Bond’s submission that, because a residence permit is merely declaratory of the EEA national’s EU law status, the Respondent is not entitled under EU law to require documentation to prove status. That muddles two concepts: EU law rights and domestic law rights. An EEA national does not require leave to remain under domestic law. The EEA national’s rights derive from EU law as do the rights of that national’s family members. They are not derived from the UK’s Immigration Rules. There is an avenue to have those EU law rights recognised in domestic law via the EEA Regulations. However, the question of whether a person relying on EU law rights for their status can sponsor a non-EEA national for the purposes of the application of domestic immigration law requirements is a matter of domestic law and not a matter of EU law. Ms Bond did not point me to any authority for her proposition.
28. I accept that the issue of whether a person is entitled to permanent residence is a matter of EU law and that the grant of a permanent residence card is simply declaratory of a right which already exists. As such, whether a person has a permanent residence card may not be determinative of that issue. Even if Ms Bond is right in her submission, though, the Respondent is entitled to require proof of that status and, for the reasons I have already given, the evidence which was before the First-tier Tribunal is insufficient to show that Ms [L] has acquired that status.
29. Second, even if Ms [L] was accepted for these purposes as a “settled” person with whom the Appellant has a genuine and subsisting relationship (as the Judge accepted), he would still have to show that Ms [L] qualifies as a partner and that it is “unduly harsh” for Ms [L] to return to Bangladesh with him or remain in the UK without him. The Respondent says that there is insufficient evidence of Ms [L] meeting the definition of “a partner” as the couple have not shown that they have been cohabiting for a period of two years.
30. Even if Ms [L] qualifies as “a partner” for these purposes, the Judge has gone on to consider the proportionality of interference with the relationship under paragraph 398 of the Rules in the context whether there were very compelling circumstances over and above those in paragraphs 399 and 399A of the Rules. Although that may not equate to the issue whether deportation would have unduly harsh consequences, nonetheless, the exercise still involves balancing the interference against the public interest in deportation in the same way as would be the case when analysing whether the consequences would be “unduly harsh” for the purposes of paragraph 399(b).



31. The Judge accepted at [87] of the Decision, that Ms [L] would not return to Bangladesh with the Appellant and therefore, unless they were to return to Ms [L]'s own country or he sought to return as the spouse of an EEA national (the couple having married under UK law), their relationship would end. The Judge accepted that the couple are "currently committed" (in spite of the fact that the Appellant had been in detention for about two-thirds of the time that they had been a couple). She accepted that this was a "strong factor" when looking at Article 8 outside the Rules under Section 117C of the 2002 Act.
32. I accept that, for the purposes of Section 117C, the same issue arises whether the Appellant falls outside of the exceptions because Ms [L] is not a "qualifying partner" for those purposes. I accept therefore that the Judge was at [88] of the Decision carrying out the balance on the same assumption that Ms [L] is not settled. However, it is difficult to see how the outcome could be any different if the balancing exercise were to be undertaken under paragraph 399(b) as opposed to under paragraph 398. The issue remains one of proportionality.
33. The Decision does not disclose any material error of law. I therefore uphold the Decision.
34. I observe (as did the Judge) that it is of course open to the Appellant to apply to revoke the deportation order, if and when Ms [L] applies for a permanent residence card (assuming one is granted). However, for the reasons I give above, it is difficult to see how the outcome could be any different applying the "unduly harsh" test under paragraph 399(b) of the Rules.

### DECISION

**I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Oxlade promulgated on 29 June 2018 with the consequence that the Appellant's appeal stands dismissed**

Signed  
Upper Tribunal Judge Smith



Dated: 6 September 2018